Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANNE M. GLAVEY,

Petitioner,

VS.

THE DIME SAVINGS BANK OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

Does the New York State law which allows jurisdiction of the Court to be predicated upon the service of process on a doorman not authorized to accept service at the non-residence address of the party violate the due process rights guaranteed to citizens of the United States under the Fourteenth Amendment to the United States Constitution.

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Petitioner, Anne M. Glavey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New York which denied leave to appeal a decision of the Supreme Court of the State of New York, Appellate Division, First Department, which upheld the violation of the due process rights of the Petitioner by affirming a trial term decision that substituted service of process on a doorman was sufficient to give trial term jurisdiction to proceed.

OPINIONS BELOW

The unpublished opinion of the New York State Court of Appeals appears as Appendix A to this Petition. The opinion of the Appellate Division, Second Department, as reported at 214 AD2d 419 is Appendix B. The unpublished orders of the Supreme Court of the State of New York, Special Term, granting foreclosure and denying reargument of the motion to foreclose are attached hereto as Appendix C.

JURISDICTION

The opinion of the Court of Appeals in this matter was filed on November 30, 1995. This appeal is made pursuant to Supreme Court rule within ninety (90) days of the date of such decision. This Court's jurisdiction is invoked under Title 28 USC Section 1257(a).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Amendment Fourteen to the United States Constitution is set forth in Appendix D.

STATEMENT OF THE CASE

It is fundamental law that no one can be deprived of life, liberty or property without due process of law.

In this case, a condominium apartment belonging to the Petitioner Anne M. Glavey was taken from her by The Dime Savings Bank of New York — who held the mortgage to the property — on the ground that the Petitioner was allegedly late with several payments on the mortgage.

The bank does not deny — nor could it — that the late payments were tendered in full with appropriate interest even before the bank began its action to foreclose.

Service in this matter was not made upon the Petitioner personally, but rather on a doorman at the condominium apartment, one Fathi Healim.

Thereafter, the process server recited that he sent a copy of the Summons and the Notice of Pendency by mail to the general address of the Petitioner, without addressing the Summons to the Petitioner's apartment by proper number.

After the time for answering the Summons and Complaint had expired, Petitioner — an airline employee — learned of the action and filed an answer, while the Board of Managers of the condominium filed a cross-claim against Petitioner.

Thereafter and one June 10, 1992, attorneys for The Dime Savings Bank moved for summary judgment, which was granted.

The case was appealed to the Appellate Division of the New York State Supreme Court, First Department, on the grounds that the referee who made the decision acted improperly, and on the grounds that substituted service was improper.

In its decision, the First Department held "Under the circumstances, substituted service (CPLR 308(2)) in this foreclosure action was properly made upon the doorman of the premises covered by the mortgage, since defendant represented her address to be said premises, and since there is insufficient evidence to demonstrate the plaintiff knew that defendant resides elsewhere."

In actual fact, Petitioner was a resident of New Jersey, and the doorman was not authorized to receive service of process for the Petitioner at the apartment.

More of this, the process server — by his affidavit — never attempted to gain access to the apartment, but merely left the Summons and Complaint with the doorman without making further inquiry as to whether he could get to the apartment itself.

Your Petitioner promptly appealed the adverse determination of the First Department to the New York State Court of Appeals, asking for leave to appeal, which leave was denied by the Court on November 30, 1995.

The New York State Court of Appeals, in affirming the Appellate Division, First Department, acted against its own standard of review, and violated the established precedents of this Honorable Court and the Fourteenth Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 at 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950), this Court recognized that prior to an action which will affect an interest in life, liberty or property protected by the due process clause of the Fourteenth Amendment, a state must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In that action, this Court, invoking the "elementary and fundamental requirement of due process" held that published notice of an action to settle the accounts of a common trust fund was not sufficient to inform beneficiaries of the trust whose names and addresses were known.

In subsequent cases, this Honorable Court has adhered unwaveringly to the principle announced in *Mullane.*

For example, in *Greene* v. *Lindsey,* 456 U.S. 444, 72 L.Ed.2d 249, 102 S.Ct. 1874 (1982), this Court held that posting a summons on the door of a tenant's apartment was an inadequate means of providing notice of forceable entry and detainer actions in multiple residences.

It is undisputed that a party's ability to take steps to safeguard its interests does not relieve the state of its constitutional obligation. This is the more so where a party is inexperienced in legal matters (*Mennonite Board of Missions* v. *Adams,* 462 US 791, 77 L.Ed.2d 180, 103 S.Ct. 2706).

In *Mennonite,* this Honorable Court overturned a tax sale on the grounds that a mortgagee did not receive notice of the tax sale.

In dissent, the Chief Justice and Justices O'Connor and Powell wrote that:

> The key focus [in due process matters] is the reasonableness of the means chosen by the state [citation omitted]. Whether a particular method of notice is reasonable depends on the outcome of the balance between the interest of the state and the individual interest sought to be protected by the Fourteenth Amendment [citation omitted]. Of course, it is not our responsibility to prescribe the form of service that the state should adopt [citation omitted]. It is the primary responsibility of the state to strike this balance, and we will upset this process only when the state strikes the balance in an irrational manner. (*Mennonite Board* at 462 US 801).

In fact, New York has set a balance which does not protect the interest of non-resident property owners, such as your Petitioner.

Due process is violated when substituted service can be made on a doorman who has no relationship whatsoever to the property owner who is a non-resident.

A similar case has twice been considered by the Courts in New York.

In *Dupont, Glore, Forgan* v. *Chen* (41 NY2d 794 [NYS Court of Appeals 1977]), New York State's highest Court concluded that "In at least some circumstances, an apartment house doorman may be a person of suitable age and discretion at the actual dwelling place of a tenant in the apartment house to whom a Summons may properly be delivered for the purposes of alternative service under CPLR 308 (subd. 2)."

In that case, the Sheriff of New York County first made several attempts at process service, first going to the actual door of the defendant's apartment, and attempting to gain access, and twice returning. Here it is notable that the process server made — by his own affidavit no multiple attempts to

serve process at the site but merely served the doorman on what was apparently his first attempt at service.

In *Dupont,* after making several attempts at service, "the deputy handed the doorman two copies of the Summons and Complaint and on returning to his office also mailed copies to each defendant."

The Court of Appeals determined that "at least under some circumstances" a doorman can be a person of suitable age and discretion where "the doorman had functioned as a responsible communicator; he had informed the deputy sheriff that defendants had received the latter's message."

The Court went on to note [at page 798]:

> While it would probably be sufficient for purposes of the statute if the defendant were a tenant in an apartment house in which, as a matter of practice, the doorman was under instructions not to admit callers without the consent of the tenants, in this case the inference was available to the referee that having been admitted on the 24th and 26th, when the deputy sheriff was barred by the doorman on the 30th, it was at the specific direction of others.

That inference is not here present, nor is there any record created by the plaintiff which would say — under the settled decisions of this Court — that Anne Glavey's due process rights were respected by this method of service.

In *Roldan* v. *Thorpe,* 117 AD2d 790 (Case 22) [1986], the Appellate Division, Second Department, also upheld substituted service on a doorman, arguing that a landlord in a small apartment building qualifies as a person of suitable age and discretion within the contemplation of CPLR 308(2).

Well might that argument be made, where the apartment is the actual dwelling place of the individual involved, and the landlord and the tenant have a business relationship.

That same argument cannot be made where the defendant is a non-resident, and the doorman has no business relationship with the tenant.

In *Greene* v. *Lindsey, supra,* this Honorable Court voided a Kentucky statute which provided that in forceable entry and detainer actions service of process could be made by posting a Summons on the door of a tenant's apartment if the tenant or members of their family over 16 years of age were not on the premises to receive it.

In delivering the opinion of the Court, Justice Brennan stated:

> The fundamental requisite of due process of law is the opportunity to be heard [citation omitted], and the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest [citation omitted]. Personal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person, and has traditionally been deemed necessary in actions styled in personam [citations omitted].
>
> Nevertheless, certain less rigorous notice procedures have enjoyed substantial acceptance throughout our legal history; in light of this history and the practical obstacles to providing personal service in every instance, we have allowed judicial proceedings to be prosecuted in some situations on the basis of procedures that do not carry with them the same certainty of actual notice that inheres in personal service. But we have also clearly recognized that the due process clause does describe a constitutional minimum: 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise*

> *interested parties of the pendency of the action* and afford them an opportunity to present their objections.' [emphasis in original]

This is the standard against which the decision of the New York State Court of Appeals and the Appellate Division of that State Supreme Court must be measured.

The question is whether or not service on a doorman provides "a reliable means of acquainting interested parties of the fact that their rights are before the Courts" [*Greene* at 454].

Here, service of process on a doorman is about equivalent to service of process on a stranger. The doorman had no duty whatsoever to make sure that the process was passed on to its intended recipient. Thus, this action falls into the class of cases which clearly state that service on an unrelated individual who has no legal duty to the defendant is not good service under law.

Service of process means the delivery or other communication of a Summons to a party against whom a proceeding is brought with the effect of legally charging the party with notice of receiving it. Under the due process clause of the federal Constitution's Fourteenth Amendment — which guarantees the right to notice and an opportunity to be heard and to defend oneself before a competent tribunal — a state court, as a general rule, has no jurisdiction to proceed to judgment against a party until the party is served with process that gives adequate notification of the pending proceedings (62 American Juris.2d, Process, Section 3).

In *Peralta* v. *Heights Medical Center,* 485 US 80, 99 L.Ed.2d 75, 108 S.Ct. 896 (1988). this Court held that a default judgment wasn't firm where the judgment was entered without timely service of process and with substantial adverse consequences to the party in default.

In *Milliken* v. *Myer,* 311 US 457, rehearing denied 312 US 712, the Court ruled that the adequacy of substituted service — at least under due process standards — is dependent on whether the form of service provided and employed is

reasonably calculated to give the interested party actual notice of the proceedings and an opportunity to be heard. Here, even under New York's somewhat amorphous standard, no argument can be made that service on an unrelated doorman gives that notice.

As the Chief Justice has written:

> . . . Property interest is not a monolithic abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the meets and bounds of which are determined the decisional and statutory law of the State of New York. The validity of the property interest in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on New York law (*Flagg Bros. Inc.* v. *Brooks,* 436 US 149 at 160 [Note 10] (1978).

However, the law of New York is circumscribed by the Fourteenth Amendment to the United States Constitution, and the due process clause. A fundamental requirement of due process is the opportunity to be heard. It is an opportunity which must be granted at a meaningful time and in a meaningful manner (*Armstrong* v. *Manzo,* 380 US 545 at 552 (1965)).

Where, as here, substituted service was effectively no service, the Supreme Court of the State of New York and its Appellate Division deprived Petitioner of rights protected to her by the Constitution of the United States.

Where, as here, Petitioner's property has been foreclosed in a proceeding based upon defective service of process, Petitioner's rights under the due process clause of the United States Constitution have clearly been violated.

Even the New York courts concede that service on a doorman is not — "under all circumstances" — proper service

herein. Under these circumstances, where the doorman has absolutely no relationship to the Petitioner and no effort was made to serve the Petitioner personally, due process mandates that this judgment be reversed.

This Court should grant certiorari to explicitly rule that service on a doorman — without more — does not comply with due process under the Fourteenth Amendment, and further to correct the decision of the New York State Court of Appeals herein, which has so far departed from the accepted and usual course of its decisional law in this matter — and sanctioned such a departure by a lower court — as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and order of the New York State Court of Appeals in this matter.

If this Court elects not to address the issues presented in this Petition at the present time, it is requested that the matter be remanded to the New York State Court of Appeals for a determination as to whether or not the Petitioner's due process rights were violated under the doctrine of *Dupont, Glore, Forgan* v. *Chen, supra.*

Dated: Tappan, New York
February 27, 1996

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